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THE ORIGIN OF USES.

THE following account of the origin of our English *Use* forms part of a projected sketch of English law as it stood at the accession of Edward I. It will there follow some remarks upon the late growth of any doctrine of informal agency, by which I mean an agency which is not solemnly created by a formal *attornatio*. I have long been persuaded that every attempt to discover the genesis of our *use* in Roman law breaks down, and I have been led to look for it in another direction by an essay which some years ago Mr. Justice Holmes wrote on Early English Equity (Law Quarterly Review, vol. i.). Whether I have been successful, it is not for me to say. I will first state my theory and then adduce my evidence.

The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.' In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus*, but from the Latin word *opus*, which in Old French becomes *os* or *oes*. True that the two words are in course of time confused, so that if by a Latin document land is to be conveyed to the use of John, the scribe of the charter will write *ad opus Johannis* or *ad usum Johannis* indifferently, or will perhaps adopt the fuller formula *ad opus et ad usum*, nevertheless the earliest history of 'the use' is the early history of the phrase *ad opus*. Now this both in

France and in England we may find in very ancient days. A man will sometimes receive money to the use (*ad opus*) of another person; in particular money is constantly being received for the king's use. Kings must have many ministers and officers who are always receiving money, and we have to distinguish what they receive for their own proper use (*ad opus suum proprium*) from what they receive on behalf of the king. Further, long before the Norman Conquest we may find a man saying that he conveys land to a bishop to the use of a church, or conveys land to a church to the use of a dead saint. The difficulty of framing a satisfactory theory touching the whereabouts of the ownership of what we may loosely call 'the lands of the churches' (a difficulty that I cannot here pause to explain) gives rise to such phrases. In the thirteenth century we commonly find that where there is what to our eyes is an informal agency, this term *ad opus* is used to describe it. Outside the ecclesiastical sphere there is but little talk of 'procuration'; there is no current word that is equivalent to our *agent;* John does not receive money or chattels 'as agent for' Roger; he receives it to the use of Roger (*ad opus Rogeri*).

Now in the case of money and chattels a certain haziness in the conception of ownership, which I hope to discuss elsewhere, prevents us from making a satisfactory analysis of the notion that this *ad opus* implies. William delivers two marks or three oxen to John, who receives them to the use of Roger. In whom, we may ask, is the ownership of the coins or of the beasts? Is it already in Roger; or, on the other hand, is it in John, and is Roger's right a merely personal right against John? In the thirteenth century this question does not arise in a clear form, because possession is far more important than ownership. We will suppose that John is the bailiff of one of Roger's manors, that in the course of his business he has gone to a market, has sold Roger's corn, has purchased cattle with the price of the corn and is now driving them home. We take it that if a thief or trespasser swoops down and drives off the beasts, John can bring an appeal or an action and call the beasts his own proper chattels. We take it that he himself cannot steal the beasts; even in the modern common law he can not steal them until he has in some way put them in his employer's possession. We are not very certain that if he appropriates them to his own use Roger has any remedy except in an action of debt or of account, in which his claim can be satisfied by a money payment. And yet the notion that the beasts are Roger's,

not John's, is growing and destined to grow. In course of time the relationship expressed by the vague *ad opus* will in this region develop into a law of agency. In this region the phrase will appear in our own day as expressing rights and duties which the common law can protect and enforce without the help of any 'equity.' The common law will know the wrong that is committed when a man 'converts to his use' (*ad opus suum proprium*) the goods of another; and in course of time it will know the obligation which arises when money is 'had and received to the use' of some person other than the recipient.

It is otherwise in the case of land, for there our old law had to deal with a clearer and intenser ownership. But first we must remark that at a very remote period one family at all events of our legal ancestors have known what we may call a trust, a temporary trust, of lands. The Frank of the Lex Salica is already employing it; by the intermediation of a third person, whom he puts in seisin of his land and goods, he succeeds in appointing or adopting an heir. Along one line of development we may see this third person, this 'saleman,' becoming the testamentary executor of whom this is not the place to speak; and our English law by forbidding testamentary dispositions of land has prevented us from obtaining many materials in this quarter. However, in the England of the twelfth century we sometimes see the lord intervening between the vendor and the purchaser of land. The vendor surrenders the land to the lord 'to the use' of the purchaser by a rod, and the lord by the same rod delivers the land to the purchaser. Freeholders, it is true, have soon acquired so large a liberty of alienation that we seldom read of their taking part in such surrenders; but their humbler neighbors, for instance, the king's sokeman, are constantly surrendering land 'to the use' of one who has bought it. What if the lord when the symbolic stick was in his hand refused to part with it? Perhaps the law had never been compelled to consider so rare an event; and in these cases the land ought to be in the lord's seisin for but a moment. However, we soon begin to see what we can not but call permanent 'uses'. A slight but unbroken thread of cases, beginning while the Conquest is yet recent, shows us that a man will from time to time convey his land to another 'to the use' of a third. For example, he is going on a crusade, and wishes that his land shall be held to the use of his children, or he wishes that his wife or his sister shall enjoy the land, but doubts, it may be, whether a woman can hold a military fee or whether a hus-

band can enfeoff his wife. Here there must be at the least an honorable understanding that the trust is to be observed, and there may be a formal 'interposition of faith.' Then, again, we see that some of the lands and revenues of a religious house have often been devoted to some special object; they have been given to the convent 'to the use' of the library or 'to the use' of the infirmary, and we can hardly doubt that a bishop will hold himself bound to provide that these dedications, which are sometimes guarded by the anathema, shall be maintained. Lastly, in the early years of the thirteenth century the Franciscan friars came hither. The law of their being forbade them to own anything; but they needed at least some poor dormitory, and the faithful were soon offering them houses in abundance. A remarkable plan was adopted. They had come as missionaries to the towns; the benefactor who was minded to give them a house, would convey that house to the borough community 'to the use of' or 'as an inhabitation for' the friars. Already when Bracton was writing, a considerable number of plots of land in London had been thus conveyed to the city for the benefit of the Franciscans. The corporation was becoming a trustee. It is an old doctrine that the inventers of 'the use' were 'the clergy' or 'the monks.' We should be nearer the truth if we said that to all seeming the first persons who in England employed 'the use' on a large scale were, not the clergy, nor the monks, but the friars of St. Francis.

Now in few, if any, of these cases can the *ad opus* be regarded as expressing the relation which we conceive to exist between a principal and an agent. It is intended that the 'feoffee to uses,' (we can employ no other term to describe him,) shall be the owner or legal tenant of the land, that he shall be seised, that he shall bear the burdens incumbent on owners or tenants, but he is to hold his rights for the benefit of another. Such transactions seem to have been too uncommon to generate any definite legal theory. Some of them may have been enforced by the ecclesiastical courts. Assuredly if the citizens of London had misappropriated the lands conveyed to them for the use of the friars, those darlings of popes and kings, they would have known what an interdict meant. Again, in some cases the feoffment might perhaps be regarded as a 'gift upon condition,' and in others a written agreement about the occupation of the land might be enforced as a covenant. But at the time when the system of original writs was taking its final form 'the use' had not become common enough to find a comfort-

able niche in the fabric. And so for a while it lives a precarious life until it finds protection in the 'equitable' jurisdiction of the chancellors. If in the thirteenth century our courts of common law had already come to a comprehensive doctrine of contract, if they had been ready to draw an exact line of demarcation between 'real' and 'personal' rights, they might have reduced 'the use' to submission and found a place for it in their scheme of actions; in particular, they might have given the feoffor a personal, a contractual, action against the feoffee. But this was not quite what was wanted by those who took part in these transactions; it was not the feoffor, it was the person whom he desired to benefit (the *cestui que use* of later days) who required a remedy, and moreover a remedy that would secure him not money compensation but the specific enjoyment of the thing granted. 'The use' seems to be accomplishing its manifest destiny when at length after many adventures it appears as 'equitable ownership.'

I will now put in some of the evidence that I have collected: —

I. The employment of the phrase *ad opus meum* (*tuum, suum*) as meaning on my (your, his) behalf, or for my (your, his) profit or advantage can be traced back into very early Frankish formulas. See Zeumer's quarto edition of the Formulae Merovingici et Karolini Aevi (Monumenta Germaniae), index s. v. *opus*. Thus, *e. g.*: —

p. 115 'ut nobis aliquid de silva ad opus ecclesiae nostrae . . . dare iubeatis.' (But here *opus ecclesiae* may mean the fabric of the church.)

p. 234 'per quem accepit venerabilis vir ille abba ad opus monasterio suo [= monasterii sui] . . . masas ad commanendum.'

p. 208 'ad ipsam iam dictam ecclesiam ad opus sancti illius . . . dono.'

p. 315 (An emperor is speaking) 'telonium vero, excepto ad opus nostrum inter Q et D vel ad C [*place names*] ubi ad opus nostrum decima exigitur, aliubi eis ne requiratur.'

II. So in Carolingian laws for the Lombards. Mon. Germ. Leges, IV. Liber Papiensis Pippini 28 (p. 520): 'De compositionibus quae ad palatium pertinent: si comites ipsas causas convenerint ad requirendum, illi tertiam partem ad eorum percipiant opus, duos vero ad palatium.' (The *comes* gets 'the third penny of the county' for his own use.)

Lib. Pap. Ludovici Pii 40 (p. 538): 'Ut de debito quod ad opus nostrum fuerit wadiatum talis consideratio fiat.'

III. From Frankish models the phrase has passed into Anglo-Saxon land-books. Thus, *e. g.*: —

Coenulf of Mercia, A. D. 809, Kemble, Cod. Dipl. v. 66: 'Item in alio loco dedi eidem venerabili viro ad opus praefatae Christi ecclesiae et monachorum ibidem deo servientium terram . . .'

Beornwulf of Mercia, A. D. 822, Kemble, Cod. Dipl. v. 69: 'Rex dedit ecclesiae Christi et Wulfredo episcopo ad opus monachorum . . . . villam Godmeresham.'

IV. It is not uncommon in Domesday Book. Thus, *e. g.*: —

D. B. i. 209: 'Inter totum reddit per annum xxii. libras . . . . ad firmam regis . . . . Ad opus reginae duas uncias auri . . . et i. unciam auri ad opus vicecomitis per annum.'

D. B. i. 60 b: 'Duae hidae non geldabant quia de firma regis erant et ad opus regis calumniatae sunt.'

D. B. ii. 311: 'Soca et saca in Blideburh ad opus regis et comitis.'

V. A very early instance of the French *al os* occurs in Leges Willelmi, 1. 2. § 3: 'E cil francs hom . . . . seit mis en forfeit el cunté afert al os le vescunte en Denelahe xl. ores . . . . De ces xxxii ores averad le vescunte al os le rei x. ores.' The sheriff takes certain sums for his own use, others for the king's use. This document can hardly be of later date than the early years of cent. xii.

VI. In order to show the identity of *opus* and *os* or *oes* we may pass to Britton, ii. 13: 'Villenage est tenement de demeynes de chescun seignur baillé a tenir a sa volunté par vileins services de emprouwer al oes le seignur.'

VII. A few examples of the employment of this phrase in connection with the receipt of money or chattels may now be given.

Liberate Roll 45 Hen. III. (Archaeologia, xxviii. 269): Order by the king for payment of 600 marks which two Florentine merchants lent him, to wit, 100 marks for the use (*ad opus*) of the king of Scotland and 500 for the use of John of Brittanny.

Liberate Roll 53 Hen. III. (Archaeologia, xxviii. 271): Order by the king for payment to two Florentines of money lent to him for the purpose of paying off debts due in respect of cloth and other articles taken 'to our use (*ad opus nostrum*)' by the purveyors of our wardrobe.

Bracton's Note Book, pl. 177 (A. D. 1222): A defendant in an action of debt confesses that he has received money from the plaintiff, but alleges that he was steward of Roger de C. and received it *ad opus eiusdem Rogeri.* He vouches Roger to warranty.

Selby Coucher Book, ii. 204 (A. D. 1285): 'Omnibus . . . R. de Y. ballivus domini Normanni de Arcy salutem. Noveritis me recepisse duodecim libras . . . de Abbate de Seleby ad opus dicti Normanni, in quibus idem Abbas ei tenebatur . . . Et ego . . . dictum abbatem . . . versus dominum meum de supradicta pecunia indempnem conservabo et adquietabo.'

Y. B. 21–2 Edw. I. p. 23: 'Richard ly bayla les chateus a la oeus le Eveske de Ba.'

Y. B. 33–5 Edw. I. p. 239: 'Il ad conté qe eux nous livererent meyme largent al oes Alice la fille B.'

VIII. We now turn to cases in which land is concerned : —

Whitby Cartulary, i. 203–4 (middle of cent. xii.) : Roger Mowbray has given land to the monks of Whitby; in his charter he says 'Reginaldus autem Puer vendidit ecclesiae praefatae de Wyteby totum ius quod habuit in praefata terra et reliquit michi ad opus illorum, et ego reddidi eis, et saisivi per idem lignum per quod et recepi illud.'

Burton Cartulary, p. 21, from an 'extent' which seems to come to us from the first years of cent. xii.: 'tenet Godfridus viii. bovatae [*corr.* bovatas] pro viii. sol. praeter illam terram quae ad ecclesiam iacet quam tenet cum ecclesia ad opus fratris sui parvuli, cum ad id etatis venerit ut possit et debeat servire ipsi ecclesiae.'

Ramsey Cartulary, ii. 257–8, from a charter dated by the editors in 1080–7: 'Hanc conventionem fecit Eudo scilicet Dapifer Regis cum Ailsio Abbate Rameseiae . . . . de Berkeforde ut Eudo habere deberet ad opus sororis suae Muriellae partem Sancti Benedicti quae adiacebat ecclesiae Rameseiae quamdiu Eudo et soror eius viverent, ad dimidium servitium unius militis, tali quidem pacto ut post Eudonis sororisque decessum tam partem propriam Eudonis quam in eadem villa habuit, quam partem ecclesiae Rameseiae, Deo et Sancto Benedicto ad usum fratrum eternaliter . . . possidendam . . . relinqueret.' In D. B. i. 210 b, we find 'In Bereforde tenet Eudo dapifer v. hidas de feodo Abbatis [de Ramesy].' So here we have a 'Domesday tenant' as 'feoffee to uses.'

Ancient Charters (Pipe Roll Soc. p. 21 (*circ.* A. D. 1127); Richard Fitz Pons announces that having with his wife's concurrence disposed of her marriage portion, he has given other lands to her; 'et inde saisivi Milonem fratrem eius loco ipsius ut ipse eam manuteneat et ab omni defendat iniuria.'

Curia Regis Roll No. 81, Trin. 6 Hen. III. m. 1 d. Assize of mort d'ancestor by Richard de Barre on the death of his father William against William's brother Richard de Roughal for a rent. Defendant alleges that William held it in *custodia*, having purchased it to the use of (*ad opus*) the defendant with the defendant's money. The jurors say that William bought it to the use of the defendant, so that William was seised not in fee but in wardship (*custodia*). An attempt is here made to bring the relationship that we are examining under the category of *custodia*.

Bracton's Note Book, pl. 999 (A. D. 1224): *R*, who is going to the Holy Land, commits his land to his b other *W* to keep to the use of his (*R*'s) sons (*commisit terram illam W ad opus puerorum suorum*); on *R*'s death his eldest son demands the land from *W*, who refuses to surrender it; a suit between them in a seigniorial court is compromised; each of them is to have half the land.

Bracton's Note Book, pl. 1683 (A. D. 1225): *R* is said to have bought

land from *G* to the use of the said *G*. Apparently *R* received the land from *G* on the understanding that he (*R*) was to convey it to *G* and the daughter of *R* (whom *G* was going to marry) by the way of a marriage portion.

Bracton's Note Book, pl. 1851 (A. D. 1226–7) : A man who has married a second wife is said to have bought land to the use of this wife and the heirs of her body begotten by him.

Bracton's Note Book, pl. 641 (A. D. 1231) : It is asserted that *E* impleaded *R* for certain lands, that *R* confessed that the land was *E*'s in consideration of 12 marks, which *M* paid on behalf of *E*, and that *M* then took the land to the use (*ad opus*) of *E*. Apparently *M* was to hold the land in gage as security for the 12 marks.

Bracton's Note Book, pl. 754 (A. D. 1233) : Jurors say that *R* desired to enfeoff his son *P*, an infant seven years old ; he gave the land in the hundred court and took the child's homage ; he went to the land and delivered seisin ; he then committed the land to one *X* to keep to the use of *P* (*ad custodiendum ad opus ipsius Petri*) and afterwards he committed it to *Y* for the same purpose ; *X* and *Y* held the land for five years to the use of *P*.

Bracton's Note Book, pl. 1244 (A. D. 1238–9) : A woman, mother of *H*, desires a house belonging to *R* ; *H* procures from *R* a grant of the house to *H* to the use (*ad opus*) of his mother for her life.

Assize Roll No. 1182, m. 8 (one of Bracton's Devonshire rolls) : 'Iuratores dicunt quod idem Robertus aliquando tenuit hundredum illud et quod inde cepit expleta. Et quaesiti ad opus cuius, utrum ad opus proprium vel ad opus ipsius Ricardi, dicunt quod expleta inde cepit, sed nesciunt utrum ad opus suum proprium vel ad opus ipsius Ricardi quia nesciunt quid inde fecit.'

Chronicon de Melsa, ii. 116 (an account of what happened in the middle of cent. xiii. compiled from charters) : Robert confirmed to us monks the tenements that we held of his fee ; 'et insuper duas bovatas cum uno tofto . . . ad opus Ceciliae sororis suae et heredum suorum de corpore suo procreatorum nobis concessit ; ita quod ipsa Cecilia ipsa toftum et ii. bovatas terrae per forinsecum servitium et xiv. sol. et iv. den. annuos de nobis teneret. Unde eadem toftum et ii. bovatas concessimus dictae Ceciliae in forma praescripta.'

IX. The lands and revenues of a religious house were often appropriated to various specific purposes, e. g. *ad victum monachorum*, *ad vestitum monachorum*, to the use of the sacrist, cellarer, almoner or the like, and sometimes this appropriation was designated by the donor. Thus, *e. g.* Winchcombe Landboc, i. 55, 'ad opus librorum' ; i. 148, 'ad usus infirmorum monachorum' ; i. 73, certain tithes are devoted 'in usum operationis ecclesiae,' and in 1206 this devotion of them is protected by a ban pronounced by the abbot ; only in case of famine or other urgent

necessity may they be diverted from this use. So land may be given 'to God and the church of St. German of Selby to buy eucharistic wine *(ad vinum missarum emendum)*'; Selby Coucher, ii. 34.

In the ecclesiastical context just mentioned *usus* is a commoner term than *opus*. But the two words are almost convertible. On Curia Regis Roll No. 115 (18–9 Hen. III.) m. 3 is an action against a royal purveyor. He took some fish *ad opus Regis* and converted it *in usus Regis*.

X. In the great dispute which raged between the archbishops of Canterbury and the monks of the cathedral monastery one of the questions at issue was whether certain revenues, which undoubtedly belonged to 'the church' of Canterbury, had been irrevocably devoted to certain specific uses, so that the archbishop, who was abbott of the house, could not divert them to other purposes. In 1185 Pope Urban III. pronounces against the archbishop. He must restore certain parochial churches to the use of almonry. 'Ecclesiae de Estreia et de Munechetun . . . . ad usus pauperum provide deputatae fuissent, et a . . . praedecessoribus nostris eisdem usibus confirmatae . . . Monemus quatenus . . . praescriptas ecclesias usibus illis restituas.' So the prior and convent are to administer certain revenues which are set apart 'in perpetuos uses luminarium, sacrorum vestimentorum et restaurationis ipsius ecclesiae, et in usus hospitum et infirmorum.' At one stage in the quarrel certain representatives of the monks in the presence of Henry II. received from the archbishop's hand three manors 'ad opus trium obedientiariorum, cellerarii, camerarii et sacristae.' See Epistolae Cantuarienses, pp. 5, 38, 95.

XI. We now come to the very important case of the Franciscans.

Thomas of Eccleston, De adventu Fratrum Minorum (Monumenta Franciscana, i.), p. 16: 'Igitur Cantuariae contulit eis aream quandam et aedificavit capellam . . . Alexander magister Hospitalis Sacerdotum; et quia fratres nihil omnino appropriare sibi voluerunt, facta est communitati civitatis propria, fratribus vero pro civium libitu commodata . . . Londoniae autem hospitatus est fratres dominus Johannes Ywim, qui emptam pro fratribus aream communitati civum appropriavit, fratrum autem usumfructum eiusdem pro libitu diminorum devotissime designavit . . . Ricardus le Muliner contulit aream et domum communitati villae [Oxoniae] ad opus fratrum.' This account of what happened in or about 1225 is given by a contemporary.

Prima Fundatio Fratrum Minorum Londoniae (Monumenta Franciscana, i.), p. 494. This document gives an account of many donations of land made to the city of London in favour of the Franciscans. The first charter that it states is one of 1225, in which John Iwyn says that for the salvation of his soul he has given a piece of land to the *communitas* of the city of London in frankalmoin 'ad inhospitandum [*a word missing*] pauperes fratres minorum [minores?] quamdiu voluerint ibi esse.'

XII. The attempt of the early Franciscans to live without property of any sort or kind led to subtle disputations and in the end to a world-shaking conflict. At one time the popes sought to distinguish between ownership and usufruct or use; the Franciscans might enjoy the latter but could not have the former; the *dominium* of all that was given to their use was deemed to be vested in the Roman church and any litigation about it was to be carried on by papal procurators. This doctrine was defined by Nicholas III. in 1279. In 1322 John XXII. did his best to overrule it, declaring that the distinction between use and property was fallacious and that the friars were not debarred from ownership. Charges of heresy about this matter were freely flung about by and against him, and the question whether Christ and His Apostles had owned goods became a question between Pope and Emperor, between Guelph and Ghibelline. In the earlier stages of the debate there was an instructive discussion as to the position of the third person, who was sometimes introduced as an intermediary between the charitable donor and the friars who were to take the benefit of the gift. He could not be treated as agent or procurator for the friars unless the ownership were ascribed to them. Gregory IX. was for treating him as an agent for the donor. See Lea, History of the Inquisition, iii. 5–7, 29–31, 129–154.

XIII. It is very possible that the case of the Franciscans did much towards introducing among us both the word *usus* and the desire to discover some expedient which would give the practical benefits of ownership to those who could yet say that they owned nothing. In every large town in England there were Minorites who knew all about the stormy controversy, who had heard how some of their foreign brethren had gone to the stake rather than suffer that the testament of St. Francis should be overlaid by the evasive glosses of lawyerly popes, and who were always being twitted with their impossible theories by their Dominican rivals. On the continent the battle was fought with weapons drawn from the armoury of Roman law. Among these were *usus* and *usufructus*. It seems to have been thought at one time that the case could be met by allowing the friars a *usufructus* or *usus*, these terms being employed in a sense that would not be too remote from that which they had borne in the old Roman texts. Thus it is possible that there was a momentary contact between Roman law — medieval, not classical, Roman law — and the development of the English *use*. Englishmen became familiar with an employment of the word *usus* which would make it stand for something that just is not, though it looks exceedingly like, *dominium*. But we hardly need say that the *use* of our English law is not derived from the Roman 'personal servitude'; the two have no feature in common. Nor can I believe that the Roman *fideicommissum* has anything to do with the evolution of the English *use*. In the first place, the English *use* in its earliest stage is seldom, if ever, the outcome of a last will, while the

fideicommissum belongs essentially to the law of testaments. In the second place, if the English *use* were a *fideicommissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*. What we see is a vague idea, which developing in one direction becomes what we now know as agency and developing in another direction becomes that *use* which the common law will not, but equity will, protect. Of course, again, our 'equitable ownership' when it has reached its full stature has enough in common with the praetorian *bonorum possessio* to make a comparison between the two instructive; but an attempt to derive the one from the other would be too wild for discussion.

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